Date: March 7, 1997
Case No.: 95-INA-322
In the Matter of:

AL'S TAX AND FINANCIAL SERVICES, INC.,
Employer

On Behalf Of:

MIRIAN UCHE IYIEGBU,
Alien

Appearance: Mohamed Alamgir, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 19, 1993, Al's Tax and Financial Services, Inc. ("Employer") filed an application for labor certification to enable Mirian Uche Iyiegbu ("Alien") to fill the position of Executive Secretary (AF 48). The job duties for the position are:

> Duties involves [sic] scheduling appointments, giving information to callers, take dictation and otherwise relieves officials of clerical work and work [sic] and minor administrative and business details; reads and routes incoming mail. Locates and attaches appropriate file to correspondence to be answered by employer.

The requirements for the position are two years of experience in the job offered.

The CO issued a Notice of Findings on October 7, 1994 (AF 23), proposing to deny certification on the grounds that the Employer unlawfully rejected U.S. applicants Keva Johnson, Nicole K. Paige, Holly Prieto, and Brenda Wilburn in violation of 20 C.F.R. § 656.21(b)(6) (now recodified as § 656.21(b)(5)) and § 656.20(c)(8). More specifically, the CO found that the Employer rejected applicants Johnson and Paige for failing to report to their interviews, but did not provide evidence of how the interviews were scheduled, or of any attempts to communicate with the applicants further. The CO questioned the Employer's rejection of applicant Prieto because it stated that two messages were on her answering machine that were never returned, but Ms. Prieto responded in a questionnaire that she left two messages for the Employer and was never contacted by phone or mail. The CO also questioned the Employer's rejection of applicant Wilburn, because it stated that Ms. Wilburn refused to be interviewed in a telephone conversation, but Ms. Wilburn responded in a questionnaire that she left two messages for the Employer and was never contacted.

In its rebuttal, dated December 14, 1994 (AF 13), the Employer contended that it sent notices to applicants Prieto and Wilburn after receiving the NOF, scheduling them for interviews on November 9, 1994. The letter to Ms. Wilburn was returned as unclaimed. Ms. Prieto did not show up or contact the Employer. The Employer further contended that applicants Johnson and Paige were contacted by telephone and scheduled for interviews on May 2, 1994, at 10:00 a.m and 10:30 a.m., respectively, but both applicants failed to appear. The Employer contends that it

[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

called Keva Johnson several times after this and left messages for her, but she did not respond. The Employer further contends that one week after this the number of Nicole Paige was not in service.

The CO issued the Final Determination on November 19, 1993 (AF 9), denying certification because the Employer failed to attempt to contact applicants Johnson and Paige by mail and that they were unlawfully rejected in violation of 20 C.F.R. § 656.21(b)(6) (now recodified as § 656.21(b)(5)) and § 656.20(c)(8). The CO also denied certification because the Employer's attempts to interview applicants Prieto and Wilburn some eight months after the advertisement had run does not establish that they were lawfully rejected.

On January 24, 1995, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6) (now recodified as § 656.21(b)(5)). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche, Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified, and available" to perform the work. 20 C.F.R. § 656.1.

Reasonable efforts to contact qualified U.S. applicants may require more than a single type of attempted contact. *Diana Mock*, 88-INA-225 (Apr. 9, 1990). Labor certification is properly denied where the Employer does not provide certified mail receipts or documentation that it attempted to contact the applicants by telephone. *M.D.O. Development Corp.*, 92-INA-326 (July 19, 1993).

In this case, the Employer initially rejected applicants Prieto and Wilburn after allegedly getting no response from them after leaving messages on their respective answering machines. After receiving the NOF, some eight months after the advertisement had run, the Employer sent certified letters to these applicants scheduling them for interviews. The Employer provided evidence that one letter was returned as unclaimed, and noted that no response was heard regarding the other letter. The Employer should have attempted contact with these applicants by certified mail at the time of initial recruitment. See *Diana Mock, supra*; *Any Phototype, Inc.*, 90-INA-63 (May 22, 1991); *Gambino's Restaurant*, 90-INA-320 (Sept. 17, 1991); *G.C.M. Iron Works, Inc.*, 91-INA-81 (Mar. 27, 1992). Moreover, the Employer's attempts to contact the

applicants after the issuance of the NOF does not establish good-faith recruitment. See *Hi Lume Corp.*, 90-INA-444 (Mar. 4, 1992).

The Employer rejected U.S. applicants Johnson and Paige after they failed to appear at interviews allegedly scheduled with them by phone, and being unable to recontact them by phone. Both applicants responded in post-recruitment questionnaires that it was their attempts at contacting the Employer that went unanswered. Regardless, the Employer again made no attempt at alternative contact, such as sending a certified letter. *Diana Mock*, *supra*; *Any Phototype, Inc.*, *supra*; *Gambino's Restaurant, supra*; *G.C.M. Iron Works, Inc.*, *supra.* An employer does not establish good-faith efforts to recruit where it simply leaves unanswered messages on an answering machine. *Berkley West Convalescence Hospital,* 91-INA-371 (Feb. 1, 1993); *K-J Machine Co.*, 93-INA-71 (Apr. 12, 1994).

Based on the foregoing, we find that the Employer has failed to establish that there are no U.S. workers who are able, willing, qualified, and available for the position. The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of March, 1997, for the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service

of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.